sentative capacity, until election to take as legatee.[13] Fifth, the rights of an executor vest at the death of the testator, so that he may sue for subsequent trespasses committed before his approval by the court. Finally, on a claim against the estate, the executor must be sued as executor.

The doctrine of dual personality was lately applied in New York, where an executor sued both individually and in his representative capacity was permitted to be represented by two counsels. *Roche* v. *O'Connor*, 95 N. Y. App. Div. 496. This fiction is also used by Mr. Justice Holmes to explain the rule which makes residuary legacies general rather than specific.[14] Formerly[15] the executor was entitled to the residue, not "as legatee of those specific chattels, but because he represented the testator, and therefore had all the rights which the testator would have had after distribution." [14] Although the residue, to-day, is usually bequeathed specifically, its character as a general bequest is retained.

RECENT CASES.

AGENCY — LIABILITY OF PRINCIPAL TO THIRD PERSONS IN TORT — RESTRICTION OF CHOICE TO LICENSED CLASS. — In an action against the defendant for the tort of his mine manager, the defendant set up that he was excused from such liability by the provisions of a statute enacting that such managers be hired only from a class licensed by the state. *Held*, that the statute furnishes no defense. *Fulton* v. *Wilmington, etc., Co.*, 37 Chic. Leg. News 75 (U. S. Circ. Ct., N. D. Ill., 1904).

The law of England has long since been settled in accord with this holding. *Martin* v. *Temperley*, 4 Q. B. 98. In the United States the few cases that have been found are in conflict. On one side is the present decision, following a previous tendency of the Illinois state courts. *Cf. Consolidated, etc., Co. of St. Louis* v. *Seniger*, 179 Ill. 370. Squarely opposed is a Pennsylvania decision, holding a state statute, which expressly attempted to impose the liability contended for in the principal case, unconstitutional. *Durkin* v. *Kingston Coal Co.*, 171 Pa. St. 193. The decision of the circuit court seems right. The restriction of the employer's choice to a licensed class modifies no factor which led the common law to impute to the master the tort of his servant. Power of control, not latitude of selection, is the criterion of his obligation. The employer's right to supervise, direct, and discharge for disobedience or incompetency remains unabridged. So should his liability.

BANKRUPTCY — DISCHARGE — INTERPRETATION OF STATUTE. — The amendment of 1903 to the Bankruptcy Act of 1898, in amending § 14 b, provides that "The judge shall . . . discharge the applicant unless he has (5) in voluntary proceedings been granted a discharge in bankruptcy within six years." A bankrupt applied for a discharge in involuntary proceedings. It was objected that, as he had been granted a discharge in voluntary proceedings within six years, he could not, under the clause quoted, be granted a discharge in the present proceedings. *Held*, that the objection must be sustained. *Matter of Neely*, 12 Am. B. Rep. 407 (U. S. Dist. Ct., S. D. N. Y.).

As the other clauses in § 14 b apply to present proceedings, both voluntary and involuntary, the fact that the fifth clause begins with the words "in voluntary proceedings" would naturally indicate an intention that those words also should be construed to apply to present rather than to former proceedings. The court's decision seems doubtful also on principle. The recent tendency in America has been to give debtors a discharge whenever their creditors force them into bankruptcy. 18 U. S. Stat. at Large, part 3, c. 390, p. 180. If the creditor gets the benefit of an equal distribution of the assets, it seems just that the debtor should be freed from the handicap of debt,

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[13] Garrett *v.* Lister, 1 Lev. 25; see also Dyer 277 b.

[14] Holmes, Common Law 344.

[15] The law allowing the executor to take the residue, when not otherwise disposed of, was changed by the St. 11 Geo. 4 and 1 Wm. 4, c. 40.

particularly when he took no part in instituting the present proceedings. The construction contended for would apparently fulfill the object of the amendment in preventing frequent voluntary proceedings quite as well as that adopted by the court. It would therefore seem that an interpretation contrary to the tendency of American legislation and to obvious justice to the debtor should not have been adopted unless warranted by less ambiguous language than that used.

BILLS AND NOTES — ALTERATIONS — LIABILITY OF NEGLIGENT PARTY FOR FRAUDULENT ALTERATIONS. — The plaintiffs signed a check drawn by one of their coexecutors, leaving spaces permitting of easy alteration. The drawer, after presentation, filled in the blank spaces, and the bank paid the check for the raised amount. *Held*, that the bank is not liable for the extra amount of the check thus fraudulently altered. *Marshall* v. *Colonial Bank of Australia*, 29 Vict. L. Rep. 804.

The Australian court followed *Young* v. *Grote*, 4 Bing. 253, which, if not overruled in terms, is discredited in England. For a discussion of the principles involved in the case, see 17 HARV. L. REV. 143.

CHAMPERTY AND MAINTENANCE — GENERAL POLICY OF THE MODERN LAW. — The defendant, an attorney, made a contract with a client whereby the defendant was to bring and prosecute, at his own expense, an action by the client against the plaintiff, a physician, for malpractice, and was to receive one third of the amount recovered. The action was brought and resulted in a judgment against the client for costs. The plaintiff then brought this action to recover the attorney's fees and costs incurred in defending the former action, by way of damages for the champerty and maintenance of the defendant's contract with his client, in consequence of which the former suit was brought. *Held*, that the plaintiff cannot recover. *Smits* v. *Hogan*, 77 Pac. Rep. 390 (Wash.). See NOTES, p. 222.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — EXTRA-TERRITORIAL VALIDITY OF DECREES GRANTED WITHOUT ACTUAL NOTICE TO DEFENDANTS. — A divorce was granted in Missouri after service by publication upon the defendant, a non-resident, who received no actual notice of the institution of the suit. *Held*, that the decree is not valid in New Jersey. *Davenport* v. *Davenport*, 58 Atl. Rep. 535 (N. J., Ch.). See NOTES, p. 215.

CONFLICT OF LAWS — MARRIAGE — CAPACITY OF PARTIES DECIDED BY LAW OF PLACE OF CELEBRATION. — The statutes of Rhode Island made a guardian's written consent requisite for obtaining a marriage license and also provided that all contracts made by a ward should be void. A Rhode Island man, under guardianship, married a Rhode Island woman in Massachusetts, without the consent of his guardian. *Held*, that, whether a marriage so celebrated in the state would be valid or not, this one, as it was lawfully celebrated in Massachusetts, must be regarded as valid. *Ex parte Chace*, 58 Atl. Rep. 978 (R. I.).

This is a decision of a new jurisdiction on a question on which there is a square conflict of authority. The general rule in this country is that a marriage, valid where celebrated, is valid everywhere, even if it would have been invalid if performed in the domicile of the parties. *Commonwealth* v. *Lane*, 113 Mass. 458. In England the law formerly was the same. *Dalrymple* v. *Dalrymple*, 2 Hag. Con. 54. But it is now settled in England that the law of the domicile of the parties determines the capacity to marry. *Sottomayor* v. *De Barros*, 3 P. D. 1. The English view has some support here, but most of the cases can be brought within the admitted exception that such foreign marriages will not be recognized if against the policy of the law or contrary to good morals. See *Commonwealth* v. *Lane*, *supra*. The doctrine of the principal case seems preferable to the English view, which is apt frequently to result in marriages being held good in some countries and void in others. *Cf. Brook* v. *Brook*, 9 H. L. Cas. 193. The American view accords with the earlier cases, and greatly lessens the probability of such disastrous conflicts.

CONFLICT OF LAWS — RIGHTS OF FOREIGN CORPORATIONS — CORPORATIONS FORMED IN ONE STATE TO TRANSACT BUSINESS IN ANOTHER. — A company incorporated under the laws of Kansas was given by its charter no powers other than that of dealing in real estate in Oklahoma. *Held*, that the corporation will not be recognized in Oklahoma. *Myatt* v. *Ponca City, etc., Co.*, 78 Pac. Rep. 185 (Okla.).

It is the general rule that corporations formed under the laws of one state may carry on business in another. *Bank of Augusta* v. *Earle*, 13 Pet. (U. S.) 519. This rule includes corporations which, though authorized to act in the states in which they are chartered, transact the greater part of their business elsewhere. *Hanna and Fin-*

ley v. *International Petroleum Co.*, 23 Oh. St. 622. Some courts have made no exception in cases in which the corporations were authorized to do nothing in the states by which they were created. *Lancaster* v. *Amsterdam Improvement Co.*, 140 N. Y. 576. The view taken by the court in the principal case that the doctrine of comity does not require that one state should be given unlimited power to dispose of the franchise of acting as a corporation in another seems sound, however, and is supported by some authority. *Hill* v. *Beach*, 12 N. J. Eq. 31. It would seem, moreover, that the facts in the case are not essentially different from those upon which a Kansas court has held that a foreign corporation empowered by its charter to act anywhere except in the state of its creation is not entitled to recognition. *Land, etc., Co.* v. *Commissioners of Coffey County*, 6 Kan. 245.

CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE — GRATUITOUS PASSENGER. — The plaintiff, an infant, was injured through the concurrent negligence of the defendant company and of the driver of the team in which she was riding. *Held*, that the negligence of the driver is not to be imputed to the infant so as to prevent recovery. *Hampel* v. *Detroit, etc., Ry. Co.*, 100 N. W. Rep. 1002 (Mich.). See NOTES, p. 219.

COSTS — SECURITY FOR COSTS — BOND OF NON-RESIDENT. — A litigant, required to give security for costs, offered the bond of a foreign guaranty company which kept property within the jurisdiction for the sole purpose of securing its liabilities. The court, although admitting the bond was good security, refused it on the ground that as a matter of law a bond of a foreign company could not be accepted. *Held*, that the bond should be accepted, since each case must be decided on its own merits. *Aldrich* v. *British, etc., Co.*, 53 W. R. 1 (Eng., C. A.).

Although this question does not seem to have arisen often in England, previous decisions have taken the opposite view, that the bond of a non-resident was not good security for costs even though he had property within the jurisdiction. *Knight* v. *DeBlaquier*, 1 Ir. Eq. 375. In the United States such a question does not often come up, as, by statute in many states, a surety must be a resident. Even where there is no such statutory provision, the same result has been reached on the ground of the difficulty in ascertaining the solvency of the foreign surety, and also in proceeding against him in case of the principal's default. *Snedicor* v. *Barnett*, 9 Ala. 434. These reasons are valid where the surety has no property within the state; but where he has sufficient assets there to warrant the court in accepting his bond save for the fact that he is a non-resident, there seems to be no good reason for rejecting it under an arbitrary rule of law, as his property may be reached to satisfy any claim. See *Pennoyer* v. *Neff*, 95 U. S. 714.

COVENANTS RUNNING WITH THE LAND — FENCING — RIGHT TO RECOVER AGAINST ASSIGNEE OF COVENANTOR. — The plaintiff transferred land to a railroad company by a deed in which the latter covenanted to build and maintain fences along the whole extent of the land granted. The railroad company assigned to the defendant, who failed to perform these covenants. The plaintiff sued the defendant for breach of covenant. *Held*, that the plaintiff may recover. *Chicago, etc., Ry. Co.* v. *McEwen*, 71 N. E. Rep. 926 (Ind., App. Ct.). See NOTES, p. 214.

CRIMINAL LAW — DOUBLE JEOPARDY — CONTINUOUS OFFENSE. — The defendant, who had been convicted and fined for engaging in the business of procuring laborers for employment outside the state without having paid the annual license tax required by law, was indicted in the same year for continuing the offense after the conviction. *Held*, that the conviction is a bar to further prosecution during the current year. *State* v. *Roberson*, 48 S. E. Rep. 596 (N. C.).

The general rule forbidding double jeopardy, when applied to continuing offenses, is that a conviction is a bar to a subsequent indictment which charges commission of the offense during any time prior to the finding of the first indictment, at least where the first indictment did not charge the offense within specified dates. *People* v. *Cox*, 107 Mich. 435. This seems fairly to imply that if the offense were continued after conviction it would be again indictable. A few cases hold this directly. *State* v. *Judge*, 43 La. An. 1119; *Gormley* v. *State*, 37 Oh. St. 120; see *Dixon* v. *Corporation of Washington*, 4 Cranch (U. S.) 114. Moreover the principal case seems questionable on principle as well as on authority. The court was doubtless influenced by the fact that the minimum fine equalled the amount of the tax. But it is difficult to see how the punishment of what had been illegal could make the continuance of it legal. A license implies permission from the proper authorities, and the defendant could not legally engage in the business until he had received that permission. Continuing to do so after conviction should have been considered a new offense.

CRIMINAL LAW — DOUBLE JEOPARDY — RIGHT OF STATE TO APPEAL. — The plaintiff in error was tried for embezzlement by a magistrate's court in the Philippine Islands and was acquitted. An act of Congress applying to the islands prohibited double jeopardy. The prosecution sought an appeal on the ground that it was allowed under the Spanish interpretation of double jeopardy. *Held*, that an appeal does not lie. Holmes, J., dissented. *Kepner* v. *United States*, 24 Sup. Ct. Rep. 797. See NOTES, p. 216.

DAMAGES — EXEMPLARY — PLAINTIFF ENTITLED AS MATTER OF RIGHT. — *Held*, that when the defendant's trespass is willful, wanton, or malicious, it is the jury's duty to assess exemplary damages, since such damages are not merely punitive, but are given in vindication of a private right. *Beaudrot* v. *Southern Ry. Co.*, 48 S. E. Rep. 106 (S. C.).

Exemplary damages are to be sharply distinguished from damages imposed for the indignity or mental suffering inflicted by a wanton or malicious tort. Courts which deny a right to the former freely accord the latter. *Smith* v. *Holcomb*, 99 Mass. 552. And where the former are awarded, instructions that they be assessed in addition to the latter are unexceptionable. *Bonelli* v. *Bowen*, 70 Miss. 142. It would, therefore, seem that exemplary damages, if allowed at all, should be regarded as solely punitive; for the plaintiff's right to be compensated for the aggravating elements of wantonness or malice has already been amply vindicated; and he can accordingly hardly be heard to complain if the imposition of such damages be left to the discretion of the jury. See *Webb* v. *Gilman*, 80 Me. 177. The South Carolina court itself has held that when exemplary damages are assessable, evidence of the defendant's pecuniary means is admissible, — a position somewhat difficult to reconcile with the theory that these damages are compensatory. *Rowe* v. *Moses*, 9 Rich. (S. C.) 423. The principal case has since been followed by the same court. See *Poulnot* v. *The Western Union Telegraph Co.*, 48 S. E. Rep. 622 (S. C.).

ELECTIONS — ILLEGAL VOTES — APPORTIONMENT. — In an election for a county official, the returns from one township indicated the presence of six illegal votes. It was impossible to determine for which of the candidates these votes had been cast. The appellant filed a petition to contest the election. *Held*, that the illegal votes should be apportioned between the candidates in the proportion that the vote of each bears to the whole number of votes cast. *Choisser* v. *York*, 71 N. E. Rep. 940 (Ill.).

There are three methods of dealing with this question: First, accept the returns without alteration. *Ex parte Murphy*, 7 Cow. (N. Y.) 153. Second, adopt the method of the principal case. *People* v. *Cicott*, 16 Mich. 283. Third, reject the returns containing illegal ballots, and, if necessary, order a new election. *Attorney General* v. *McQuade*, 94 Mich. 439. The first view, if followed, would give undue electoral weight to the township from which the illegal returns came in comparison with other townships. The second method would obviate the difficulty of the first by cutting down the vote to its correct numerical basis; but, as between the candidates, where the election is in doubt, the injustice would remain; for a mere apportionment of the illegal votes could not change their relative positions. Under such circumstances the better plan would be to reject the returns and order a new election. This would do justice as between the candidates, carry out the will of the people, and take away the incentive for fraud.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — RIGHT TO REPRESENTATION BY TWO COUNSEL. — *Held*, that where an executor is sued both individually and in his representative capacity, he is entitled to be represented by two counsel. *Roche* v. *O'Connor*, 95 N. Y. App. Div. 496. See NOTES, p. 224.

EXTRADITION — INTERSTATE EXTRADITION — DEFENSE OF STATUTE OF LIMITATIONS. — The petitioner was held under an extradition warrant for a crime committed five years previously. In *habeas corpus* proceedings it was proved that in the demanding state an indictment must be brought within two years of the commission of the offense, except in the case of persons fleeing from justice. The petitioner had not spent two years in that state since the crime. *Held*, that the prisoner may be extradited, irrespective of the motive with which he left the demanding state. *In re Bruce*, 132 Fed. Rep. 390 (Circ. Ct., Dist. of Md.).

The words "fleeing from justice" in extradition statutes do not require willful or conscious flight. *In re White*, 55 Fed. Rep. 54. There seems little reason for a different reading of similar phraseology in criminal statutes of limitation, since the important fact in either case is that the accused consciously puts himself outside the jurisdiction. Yet the consciousness of flight is generally considered necessary in this

case. *United States* v. *O'Brian*, 3 Dill. (U. S. C. C.) 381; see *Streep* v. *United States*, 160 U. S. 128. But upon extradition proceedings the inquiry is mainly whether the defendant is substantially charged with crime and is a fugitive from justice in the sense of the extradition statutes. *Roberts* v. *Reilly*, 116 U. S. 80. He is substantially charged in the federal court, although the indictment shows that the statute of limitations has run; for the statute constitutes a mere defense of fact for the jury. *United States* v. *Cook*, 17 Wall. (U. S.) 168. It follows that the accused may only show by this defense in extradition proceedings that he was within the demanding state for the statutory period, and hence did not leave it as a fugitive from justice as that phrase is interpreted in the extradition laws.

HIGHWAYS — RIGHTS AND REMEDIES OF ABUTTERS — ACTION BY SPECIALLY ASSESSED PROPRIETOR. — The plaintiff, a landholder, who had been specially assessed for the repair of a contiguous road, sued the members of the board of local improvements, alleging that they corruptly caused to be laid a pavement inferior to that expressly required by the ordinance, and that the property of the plaintiff was thereby decreased in value. *Held*, that a demurrer to the declaration should be overruled. *Gage* v. *Springer*, 71 N. E. Rep. 860 (Ill.).

At common law, one cannot recover for a default causing damage similar in kind though different in degree to the public. *Payne* v. *Partridge*, 1 Salk. 12. In the present case it is admitted that there would ordinarily have been no action, even though the officials, in contravention of an express ministerial duty, had rendered the road impassable; for a badly paved street, however much it might injure the plaintiff, would cause inconvenience and depreciation of property, in some measure, to every one living in the community. The court, however, attempts to derive damage peculiar in kind from the fact of special assessment. Though it is believed that there are no cases in point, this distinction seems untenable. The plaintiff was not complaining of the assessment, but of the faulty pavement, and it matters not how or by whom the expense of the pavement was defrayed; the damage which the plaintiff suffers by having it badly laid, remains precisely the same.

HOMICIDE — SUICIDE — ACCESSORIES BEFORE THE FACT. — A statute provided that in all felonies accessories before the fact should be liable to the same punishment as the principal, and might be prosecuted jointly with the latter, or severally, though the principal had not been taken or tried. *Held*, that an accessory before the fact to a suicide is guilty of murder as a principal in the second degree. *Commonwealth* v. *Hicks*, 82 S. W. Rep. 265 (Ky.).

The common law conception of suicide as a form of murder is here adopted by the court. For a discussion of the principles involved, see 17 HARV. L. REV. 566.

JOINT WRONGDOERS — JUDGMENT AS TO ONE AND NON-SUIT AS TO ANOTHER. — The plaintiff brought a joint action against a railroad company and its special officer for injuries inflicted by the latter. A non-suit was entered as to the company and a judgment was rendered against the officer. The entry of non-suit was appealed. *Held*, that since the plaintiff has one judgment on the joint action, the judgment of non-suit cannot be reversed. *Higby* v. *Pennsylvania R. R. Co.*, 209 Pa. St. 453.

An injured party may, at his election, sue joint tort-feasors jointly or severally. *Cabell* v. *Vaughan*, 1 Wms. Saund. 291 f; *Sessions* v. *Johnson*, 95 U. S. 347 (*semble*). Logically, once having made his choice, he cannot turn a joint into a several action. Accordingly, in Pennsylvania, a plaintiff, having alleged a joint tort, is not allowed to enter a *nolle prosequi* as to one defendant and recover, as to another, for a several tort. *Wiest* v. *Electric, etc., Co.*, 200 Pa. St. 148; *cf. Wallace* v. *Third Avenue R. R. Co.*, 36 N. Y. App. Div. 57. In the principal case the plaintiff elected a joint action and the non-suit could not change its nature. The judgment secured was joint and, on principle, he could not split it by appealing from that part constituted by the non-suit. *Cf. Leese* v. *Sherwood*, 21 Cal. 151. The court rests its decision on this narrow ground of technical procedure, but modern practice generally allows greater liberality. The action has been considered both joint and several, and so, in New York, a contrary decision was reached. *Hurley* v. *New York, etc., Co.*, 13 N. Y. App. Div. 167. For purposes of review the action was regarded as severed, and a new trial granted as to one defendant.

JURY — CHALLENGE FOR CAUSE — SERVICE ON FORMER TRIAL. — Two aldermen were successively convicted of receiving bribes, on informations substantially identical. A witness on the first trial had testified to the guilt of the second defendant. The testimony, however, was purely corroborative, nor did it appear that either of the defendants knew of the other's offense. Five of the jurors in the second trial had served on the first, all of whom denied having formed any opinion as to the guilt or

innocence of the defendant. The court overruled the defendant's challenge for cause. *Held*, that the ruling is error. *People* v. *Mol*, 100 N. W. Rep. 913 (Mich.).

Where the facts sufficiently appear, the cases in which service on a former trial of another defendant has been held ground for disqualification, seem regularly to fall into two classes: (1) where there was participation in the offense; (2) where the verdict in both cases depended on proof of the same material fact. Examples of the first class are a joint assault, bribery of one defendant by the other, and participation by both in the same illegal game. *People* v. *Troy*, 96 Mich. 530; *Brown* v. *State*, 104 Ga. 736; *Obenchain* v. *State*, 35 Tex. Cr. App. 490. An instance of the second class was where both defendants had sold liquor to a person of known intemperate habits. As both sales were admitted, the vendee's reputation became the only fact in issue. *Smith* v. *State*, 55 Ala. 1. In the principal case there was no participation, and the evidence of the second defendant's guilt was purely corroborative. To raise upon such facts a conclusive presumption of prejudice would seem scarcely necessary. Support is, however, lent the case by a Michigan statute, which, by prohibiting the questioning of jurors concerning their verdict, might render extremely difficult any thorough examination of a juror's professions of impartiality.

JURY — PEREMPTORY CHALLENGES — NUMBER ALLOWED WHEN SEVERAL INDICTMENTS ARE CONSOLIDATED. — A statute provided that "in all . . . cases, civil and criminal, each party shall be entitled to three peremptory challenges." A single defendant was tried on nine indictments concerning the same scheme to defraud, which had been consolidated under a statute. *Held*, that it is error to restrict the defendant to three peremptory challenges. *Betts* v. *United States*, 132 Fed. Rep. 228 (C. C. A., First Circ.).

Although the rule laid down apparently places the defendant in a better situation than he would have occupied if the trials had been separate, the few decisions upon this statute are favorable to the position of the court. Thus the Supreme Court of the United States has held that when several actions against different defendants are consolidated and tried together, each defendant has three peremptory challenges. *Mutual, etc., Co.* v. *Hillmon*, 145 U. S. 285. And the Circuit Court of Appeals for the eighth circuit has decided that it is not error to allow a single plaintiff in such a consolidated suit more than three peremptory challenges. *Times Publishing Co.* v. *Carlisle*, 94 Fed. Rep. 762, 780. The result of these decisions seems to be that a trial of several actions which have been consolidated, is, in substance, not a trial of a single case but of several separate ones, and that the number of challenges should be computed on this basis. As no distinction can be taken under the statute between civil and criminal cases, these adjudications would seem fully to support the present case.

LIMITATION OF ACTIONS — ACCRUAL OF ACTION — CITY WARRANTS. — An Oklahoma statute authorized the levy of a special tax for payment of city warrants. After more than the statutory period had elapsed since the issue of his warrants, the plaintiff brought *mandamus* to compel the city officials to levy the tax. The defendants set up the statute of limitations. *Held*, that the statute does not begin to run on the warrants until the city has provided a fund for their payment, and that the *mandamus* proceedings are consequently not barred. *Barnes* v. *Turner*, 78 Pac. Rep. 108 (Okla.).

The decision purports to proceed upon the rule that when payment of town warrants is to be made out of a particular fund, the cause of action does not accrue until that fund is provided. This proposition is based upon an interpretation of the city's promise as one to pay when the money is available, and though denied in some jurisdictions, it may possibly be regarded as established. *Lincoln County* v. *Luning*, 133 U. S. 529; *contra*, *Wilson* v. *Knox County*, 28 S. W. Rep. 896 (Mo.). In most of the cases, however, it seems a fair inference from facts not always clear that it never rested with the warrant-holder to determine when the fund should be available; for the warrants were payable only out of money derived from the general taxes and appropriated to the special purpose, and the creditor had no remedy on the warrants if the revenues were disbursed in other ways. See *Sawyer* v. *Colgan*, 102 Cal. 283. In the Oklahoma case the plaintiff could plainly have compelled the provision of the fund at any time by instituting *mandamus* proceedings. *Goldman* v. *Conway County*, 10 Fed. Rep. 888. The case seems, therefore, a questionable extension of the general principle relied on. See, however, *Davis* v. *Commissioners of Lincoln County*, 23 Nev. 262.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — STATUTORY LIABILITY: WHAT LAW GOVERNS. — A Montana statute made directors liable for corporation debts if they failed to file an annual report, provided suit was

brought by the creditor within one year after such failure, time not to be counted in favor of a director out of the state. Two years after the plaintiff had acquired a right under this statute against the defendant, who had never been in Montana, a code of civil procedure was passed there, one section of which limited the time for bringing action against directors, even as to rights already accrued, and as against defendants everywhere, to three years. The plaintiff brought suit in Connecticut more than three years after his right had accrued. *Held*, that the Montana statute of limitation applies and the action is barred. *Davis* v. *Mills*, 194 U. S. 451. See NOTES, p. 220.

MORTGAGES — RIGHTS AND LIABILITIES OF PARTIES — COMPENSATION. — A mortgagee in possession claimed on foreclosure a commission of five per cent of the rents as compensation for his services in collecting them and caring for the estate. *Held*, that he is not entitled to compensation. *Barnard* v. *Paterson*, 100 N. W. Rep. 893 (Mich.).

The English courts early established the policy that no trustee is entitled to a collateral advantage as compensation. *Ayliffe* v. *Murray*, 2 Atk. 58. This included a mortgagee in possession, since, in so far as he is not holding as trustee for another, he is holding for himself as a money-lender, and so is zealously deprived of chances for usury and oppression. Accordingly equity, in its abundant sympathy for the mortgagor, refused to enforce an express agreement for compensation. *French* v. *Baron*, 2 Atk. 120. But the mortgagee may reasonably employ an agent at the expense of the mortgagor. *Bonithon* v. *Hochmore*, 1 Vern. 316. This shows the services themselves are valuable and legitimate. In the United States it is quite generally agreed by statute or otherwise that, in the interests of efficient management, a fiduciary should receive compensation. *Barney* v. *Saunders*, 16 How. (U. S.) 535, 542. Several states that reach this result without statute apply the same policy to the legitimate services of the mortgagee, under close scrutiny to avoid oppression. *Gibson* v. *Crehore*, 5 Pick. (Mass.) 146. This is in accordance with modern conceptions, but the weight of authority is with the principal case. *Blunt* v. *Syms*, 40 Hun (N. Y.) 566.

PAROL EVIDENCE RULE — CONSTRUCTION OF INSTRUMENT — RULE APPLIED TO THIRD PARTIES. — A furnace company contracted in writing with the defendants for reduced freight rates on the product of "two blast furnaces." The company had in fact only one furnace. The plaintiff, in an action to recover for excessive freight charges of the defendants, sought to introduce evidence tending to show that one of the two furnaces referred to in the contract was a furnace operated by him, and that he was therefore entitled to the benefit of the reduced rates, although his name did not appear in the instrument. *Held*, that the evidence is not admissible. *Thompson* v. *Erie R. R. Co.*, 96 N. Y. App. Div. 539.

The court felt itself unable to admit the evidence under the rule forbidding the introduction of extrinsic evidence to vary a written instrument. But it is commonly stated that this rule applies only to the parties to the instrument. See *Lowell Manufacturing Co.* v. *Safeguard Insurance Co.*, 88 N. Y. 591. Accordingly a stranger to a mortgage deed has been allowed to set up an oral agreement between the debtor and the mortgagee. *Jewett* v. *Sunbach*, 5 S. D. 111. This distinction is reasonable, since it would clearly be unfair to deprive third persons of the right to contradict an instrument merely because the parties who made it are bound by its terms. In the present case, however, the plaintiff, although not mentioned in the agreement nor claiming under it as assignee, is attempting to vary the terms of a contract on which he seeks to hold the defendant liable; and so the case comes well within the reason of the rule which prevents the use of extrinsic evidence to vary what the parties have agreed should be the final memorial of their transaction. See 1 GREENL., EVID., 16th ed., § 305 *h*.

PATENTS — INFRINGEMENT — SUCCESSIVE CONFLICTING DECISIONS REGARDING THE SAME PATENT IN DIFFERENT CIRCUITS. — *Held*, that in an action for infringement of patent the Circuit Court of the second circuit will follow the Circuit Court of Appeals of the second circuit, notwithstanding a contrary decision of the Circuit Court of Appeals of another circuit on the same facts. *Eldred* v. *Breitwieser*, 132 Fed. Rep. 251 (Circ. Ct., W. D. N. Y.). See NOTES, p. 217.

RAILROADS — LIABILITY TO TRESPASSERS — CONTRIBUTORY NEGLIGENCE. — The defendant's brakeman, three cars ahead, threw pieces of coal at the plaintiff, who was stealing a ride while the train was in rapid motion. When dodging the coal, the plaintiff let go his hold and was thrown under the wheels. *Held*, that since the plaintiff jumped from the cars voluntarily, the defendant is not liable. *Powell* v. *Erie R. R. Co.*, 58 Atl. Rep. 930 (N. J., C. A.).

A railroad company is liable if a trespasser is injured by being ejected from a rapidly moving car. *Rounds* v. *Delaware, etc., R. R. Co.*, 64 N. Y. 129. Whether there is the same liability when the trespasser jumps off in obedience to a peremptory command is apparently in conflict. A judgment for an infant trespasser in such a case will not be disturbed. *Kline* v. *Central Pacific R. R. Co.*, 37 Cal. 400. And in the case of an adult the same conclusion is reached if the one issuing the command is in a position to enforce it immediately. *Gulf, etc., Ry. Co.* v. *Kirkbride*, 79 Tex. 457. On the other hand, if threatening commands are given but no actual force can be immediately applied, the defendant is not liable to an adult. *Plantz* v. *Boston, etc., R. R. Co*, 157 Mass. 377. The line seems to be drawn on the question of compulsion in fact, for if the plaintiff's act was voluntary he contributes in causing his own damage. *Plantz* v. *Boston, etc., R. R. Co., supra.* On this principle the present case may be supported; but in concluding from the facts that the plaintiff's act was voluntary the court goes further than in any other case found.

RECEIVERS — INTERFERENCE WITH — FORECLOSING LIEN OBTAINED ON TAX SALE. — Land conveyed to a trustee to secure to the plaintiff the repayment of a loan, was later sold for taxes, and purchased by the person through whom the defendant claims. By statute, land sold for taxes might be redeemed within two years. If it was not redeemed, the purchaser might get a deed from the court after the expiration of this period, but if he failed to procure it during the third year, the right of redemption revived, existing until the deed was obtained. Six years after the sale, a receiver was appointed in a federal court for the plaintiff corporation, and one year after this appointment, the defendant obtained his deed from the state court. *Held*, that a decree should issue from the former court declaring the tax deed void, but ascertaining a prior lien in favor of the defendant. *Johnson* v. *Southern, etc., Association*, 132 Fed. Rep. 540 (Circ. Ct., W. D. Va.).

The defendant, having paid the consideration, holds an equitable title to the land, the legal title to which is in the state auditor. Since, under the statute, the plaintiff may redeem by reimbursing the purchaser, he stands in the relation of a mortgagor of the latter's equitable title. The obtaining of a deed from the state court by the purchaser destroys the plaintiff's equity of redemption. But the possession of a receiver is the possession of the court; the property is a fund in court, and if there is to be a change in the receiver's property rights, it should be through his administration. *Wiswall* v. *Sampson*, 14 How. (U. S.) 52. Because of this principle, liens and mortgages may not, by the prevailing authority, be foreclosed after the appointment of a receiver, but must await adjustment by him. *Walling* v. *Miller*, 108 N. Y. 173; *Phelps* v. *Sellick*, Fed. Cas. No. 11,079. In the present case, the state court has cut off a property right which was entrusted to the receiver; and the existence of the principle mentioned, which seems founded in necessity, accounts for the apparently harsh decision. But see *Preston* v. *Loughran*, 58 Hun (N. Y.) 210.

RECORDING AND REGISTRY LAWS — NOTICE BY RECORD — POSSESSION OF TENANT IN COMMON AS CONSTRUCTIVE NOTICE OF UNRECORDED CONVEYANCE FROM CO-TENANT. — *Held*, that the possession of one tenant in common is constructive notice of a title acquired by him from a co-tenant as against the latter's judgment creditor, though the conveyance was not recorded. *Collum* v. *Sanger Bros.*, 82 S. W. Rep. 459 (Tex., Sup. Ct.). See NOTES, p. 218.

RULE AGAINST PERPETUITIES — TIME OF VESTING AND NOT THE DURATION OF THE ESTATE THE TEST. — A testator left his residuary estate in trust to A for life, remainder to several grandchildren for life, with remainders to their children. The grandchildren were born after the death of the testator and before the death of A. *Held*, that the life estates to the grandchildren are valid, but that the remainders over are void. *Graham* v. *Whitridge*, 57 Atl. Rep. 609 (Md.).

In many former cases Maryland considered that the rule against perpetuities condemned any trust that might last longer than lives in being and twenty-one years thereafter, on the ground that the disposal of the whole estate should not be so long suspended. *Barnum* v. *Barnum*, 26 Md. 119. This confounded two distinct rules of law; that estates cannot be made inalienable, and that future estates may not be created after a fixed limit. The court failed to see that an equitable fee is a present and not a future estate and is not less alienable than a legal fee. See GRAY, PERPETUITIES § 236. The principal case brings Maryland into line with all the authorities in regarding the time of vesting and not the time of ending of estates as the test. The remainders to the children of unborn grandchildren are clearly void under either test. The life estates would be void under the old test of duration, as part of a trust ex-

tending beyond lives in being and twenty-one years. *Lee* v. *O'Donnell*, 95 Md. 538. But because they must vest, if at all, within the legal period, the court correctly holds them good. *Otis* v. *McLellan*, 13 Allen (Mass.) 339.

SALES — RIGHTS AND REMEDIES OF BUYERS — DUTY TO FURNISH CARS. — The plaintiff sued on an executory contract for the sale of lumber, to be delivered f. o. b. cars at the defendant's place of business. The vendor set up in defense that the plaintiff should have furnished the cars. *Held*, that this is the duty of the seller, and is not a condition precedent to be performed by the buyer. *Vogt* v. *Shienebeck*, 100 N. W. Rep. 820 (Wis.).

It is clear that where a contract provides for the delivery of goods f. o. b. cars, it is the seller's duty to load the goods upon them, and to assume all trouble and expense incidental to such loading. *Sheffield Furnace Co.* v. *Hull, etc., Co.*, 101 Ala. 446. The Wisconsin court argues that supplying cars is but a means to the end which the seller must accomplish. It is well established that where the delivery is to be f. o. b. a ship, the buyer must name and furnish the ship; and by analogy some courts have required the buyer to furnish cars. See *Armitage* v. *Insole*, 14 Q. B. 728; *Hocking* v. *Hamilton*, 158 Pa. St. 107. This rule proceeds upon the theory that as the buyer is to pay the freight, he is the one to make all arrangements for the carriage of the goods. Ordinarily to-day, however, where transportation is to be by rail, this circumstance has little force; for rates are generally uniform, and often, as in the principal case, shipment is possible over only one railroad. The Wisconsin rule seems, therefore, thoroughly consistent with modern business conditions. See *Cincinnati, etc., R. R. Co.* v. *Consolidated, etc., Co.*, 7 W. L. Bul. 200.

STATUTES — AMENDMENTS — EFFECT ON ACT PREVIOUSLY AMENDED. — In 1901 an act amendatory of certain sections of a statute which had previously been "amended to read as follows," was passed. The act of 1901 made no reference to the previous amendment. *Held*, that the act is valid. *Village of Melrose Park* v. *Dunnebecke*, 71 N. E. Rep. 431 (Ill.).

This decision is important as overruling an earlier Illinois case, and settling the law of that state in accord with the great weight of authority. *Cf. Louisville, etc., R. R. Co.* v. *City of East St. Louis*, 134 Ill. 656; *Columbia Wire Co.* v. *Boyce*, 104 Fed. Rep. 172. It is argued by the opponents of this position that where a section of a statute is amended, it ceases to exist, and therefore cannot be the subject of further legislation by amendment. *Feibleman* v. *State*, 98 Ind. 516. This reasoning, however, seems too refined for practical value. While in theory the amended act no longer exists, in reality it retains its place upon the statute book. A reference to it would, therefore, seem sufficient as clearly showing the intention of the legislature that the present enactment should take the place of the previous act as amended. *Commonwealth* v. *Kenneson*, 143 Mass. 418.

TAXATION — FRANCHISE TAX. — A statute of New York which went into effect Oct. 1, 1901, relating "to franchise taxes of insurance companies," provided for an annual state tax upon life insurance companies equal to one per cent on the gross amount of premiums received during the preceding calendar year for business done in the state. *Held*, that since this tax is imposed "for the privilege of exercising corporate franchises," it can be laid only upon such business as depended upon the exercise of such franchises after the passing of the statute; and since the collection of premiums upon contracts of insurance already made is not the exercise of a franchise, but depends upon an absolute contract right, premiums received upon contracts of insurance entered into before Oct. 1, 1901, cannot be taken as part of that gross amount of premiums upon which the tax is imposed. *People ex rel. The Provident, etc., Society* v. *Miller*, 32 N. Y. L. J. 303 (N. Y., Ct. of App., Oct. 18, 1904).

The rule laid down that the franchise tax can be imposed only upon such business as depends upon the exercise of the franchise is novel. A franchise tax is not a tax on business done; it is a tax on the value of the franchise. *People* v. *Home Insurance Co.*, 92 N. Y. 328. The cases hold that it is necessary only that the method of taxation employed furnish a fair basis by which to estimate this value. *Connecticut Insurance Co.* v. *Commonwealth*, 133 Mass. 161. The total amount of business done is considered a fair measure, but so, also, is the market value of the stock. *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Hamilton Company* v. *Massachusetts*, 6 Wall. (U. S.) 632. But granting the correctness of the holding as to what this tax reaches, it is difficult to understand the ruling that the collection of premiums upon contracts already entered into is not the exercise of a corporate franchise. It would seem axiomatic that every act of a corporation within its powers is an exercise of a corporate franchise. It is submitted, therefore, that the decision is erroneous. *Cf. Patterson, etc., Co.* v. *State Board of Assessors*, 69 N. J. Law 116.

TELEGRAPH COMPANIES — LIABILITY TO ADDRESSEE — DELAY OR NON-DELIVERY. — *Semble*, that where the contract between the sender of a telegram and the telegraph company is made for the benefit of the addressee he may maintain an action against the company for neglect to deliver. *Frazier* v. *Western Union Telegraph Company*, 78 Pac. Rep. 330 (Ore.).

Whether a telegraph company owes to the addressee of a message any duty to transmit and deliver carefully is a question that has been argued in the courts of many states with little uniformity of result. The above case apparently furnishes the first indication of Oregon's attitude. For a discussion of the principles involved, see 17 HARV. L. REV. 365.

TRADE MARKS AND TRADE NAMES — MARKS AND NAMES SUBJECT OF OWNERSHIP — GEOGRAPHICAL NAMES. — The defendants entered the jewelry business in Iowa City under the name "Elgin Jewelry Company." The plaintiff, the Elgin National Watch Co. of Elgin, brought a bill to enjoin the defendants from using the word "Elgin" in connection with the jewelry business. *Held*, that through the plaintiff's use of the word "Elgin," in connection with the jewelry business, it has acquired such a secondary meaning as to enable the plaintiff to assert an exclusive right thereto against any one not carrying on that business in good faith at the same geographical location. *Elgin, etc., Co.* v. *Loveland*, 132 Fed. Rep. 41 (Circ. Ct., N. D. Ia.).

For a discussion of the principles involved, see 18 HARV. L. REV. 56.

USES — STATUTE OF USES — APPLIED TO PERSONALTY. — A devised the residue of his estate, real and personal, to trustees and their successors on trust to pay the income to B for life, and after her death to hold for such of A's descendants as B should by will appoint; and on default of appointment to hold for others. B duly appointed the estate to several persons for life, and the remainders went as on default. *Held*, that the life estates and the remainders are legal and not equitable estates. *Graham* v. *Whitridge*, 58 Atl. Rep. 36 (Md.).

The court says the original trust became passive on the death of B and was executed by the Statute of Uses. This application of the statute to personalty is technically wrong, because the grantor is not "seized" of it, and is contrary to the weight of authority. *Williams* v. *McConico*, 36 Ala. 22. But without noticing this, courts have sometimes applied the statute to an estate composed of both realty and personalty where the trustee's active duties ceased with the life estate. *Doe d. White* v. *Simpson*, 5 East 162. The result may be supported if the court can find an expressed intention to give the trustees a legal estate for only a limited period, with legal remainders over; and there is some evidence of this intention in the fact that the donor reached this result as to his realty and purported to treat his personalty in the same way. But this is solely a matter of construction and seems to be ineffective in the principal case in the face of an express requirement that the trustees continue to hold either for the purposes of the appointment or on default of appointment.

WATER AND WATERCOURSES — NATURAL WATERCOURSES — RIPARIAN RIGHT TO NATURAL FLOW. — The defendant, a riparian proprietor opposite the plaintiff, maintained a dam extending more than half-way across the river. This obstructed the flow sufficiently to enable the defendant thereby to irrigate his own land; but it did no appreciable damage to the plaintiff, who brought suit for interference with her right to have the waters flow by her premises in their natural condition. *Held*, that as the defendant has not "sensibly diminished, obstructed nor diverted" the stream, he is not liable. *Nagle* v. *Miller*, 29 Vict. L. Rep. 765.

In arriving at this conclusion the Victorian court purports to recognize the English rule, that any permanent encroachment on the bed of a running stream sufficient sensibly to interfere with the natural flow thereof, is ground for complaint on the part of any riparian owner who is sensibly injured thereby, without proof that actual damage has been or will be sustained. *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 47; *The Earl of Norbury* v. *Kitchin*, 15 L. T. Rep. N. S. 501. In America the general rule is that no action lies without proof of actual damage. *Norway Plains Co.* v. *Bradley*, 52 N. H. 86; *Seeley* v. *Brush*, 35 Conn. 419. There can be little doubt that the American rule is better adapted to the needs and requirements of a new country in order to encourage the development of its natural resources. The conclusion, therefore, is eminently warranted, though it could hardly have been reached by following the English rule. In supporting its view, the court has construed the finding of fact that the plaintiff had suffered "no appreciable damage" to mean "no sensible injury," and thereby has made an easy transition from the English to the American doctrine.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — PRODUCTION OF DOCUMENTS. — The defendant was ordered to produce, for the purpose of refreshing

his recollection at an examination before trial, the books of a corporation of which he was treasurer. He refused to obey the order on the ground that so doing would incriminate him. *Held*, that the defendant is guilty of contempt of court. *Pray* v. *Blanchard Co.*, 95 N. Y. App. Div. 423.

The decision was based upon the grounds that the defendant could assert his alleged privilege only by appealing from the order, and that the mere production of the books for the purpose of refreshing his recollection could not of itself tend to incriminate him. The second ground seems to have been well taken. The rule that a witness need not furnish evidence against himself is of long standing. *East India Co.* v. *Campbell*, 1 Ves. 246. And the production of documents to be used in evidence is within the privilege. *Boyd* v. *United States*, 116 U. S. 616. In the principal case, however, the books were, by the terms of the order, to be used merely for the purpose of refreshing the recollection of the witness. It seems clear that a court has power to make such an order. *Chapin* v. *Lapham*, 20 Pick. (Mass.) 467. If, upon the examination, questions should be put to the defendant the answers to which would tend to incriminate him, he could then assert his privilege. The mere production of documents does not make them evidence. *Merrill* v. *Merrill*, 67 Me. 70.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

POWER OF STATE COURT OVER RECEIVER APPOINTED BY FEDERAL COURT. — The old English rule that a receiver could not be sued without the leave of the court appointing him caused much injustice, when courts, usually federal, began to use such officials in this country to take charge of large corporations. Small claimants were practically without legal redress against corporations so managed. To remedy this, Congress, in March, 1887, enacted that receivers appointed by any United States court may be sued in respect of anything done in carrying on the business, without the previous leave of the appointing court; provided, however, that such suit shall be subject to the general equity jurisdiction of the appointing court, "so far as the same may be necessary to the ends of justice." Some points as yet unsettled under this law are treated in an interesting recent article in the Central Law Journal. *Has a State Court Jurisdiction to Issue an Injunction Against a Receiver Appointed by a Federal Court?* by W. A. Coutts, 59 Cent. L. J. 382 (Nov. 11, 1904). The writer first discusses whether a state court in which suit has been brought has jurisdiction to levy execution for the enforcement of its judgments. Conceding the federal court's authority to intervene if justice demands, it is nevertheless contended that the conferring of jurisdiction to sue gave the state court jurisdiction to enforce judgment by its own independent process. It is argued that there are only *dicta* against this, and *In re* Tyler (149 U. S. 164), which has been regarded as deciding the point, is distinguished as within the clause authorizing interference so far as "necessary," even if proceedings under a tax warrant come within the meaning of "suit" in the act of Congress, which is doubted.

Mr. Coutts's view on this matter seems hardly likely to prevail, however. Where there is no statute dispensing with the need of leave to sue in another court and such permission is granted, process may not issue from that other court, for it is for the appointing court to settle the time and manner of satisfying the judgment. *Harding* v. *Nettleton*, 86 Mo. 658. Confusion would seem to be avoided and the end of the act giving leave to sue attained by the observance of the same rule.

If power to issue process is denied to the state court Mr. Coutts still maintains that it may have authority to issue injunctions against receivers. Levy and sale under process, he admits, affect property, and creditors may have a right to a *pro rata* distribution of the proceeds, requiring control by the appointing